

STATE OF MICHIGAN  
IN THE MICHIGAN SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Appellee,

2020 MICHIGAN SUPREME COURT  
NO.

COA DOCKET NO. 349349

TRIAL COURT NO. 16-19842-FC

v

ORG. COA DOCKET NO. 337977

STEPHEN MICHAEL BIESZKA,

MICHIGAN SUPREME COURT NO.  
156325

Applicant-Appellant.

\* \* \* \* \*

APPLICANT-APPELLANT STEPHEN MICHAEL BIESZKA'S APPLICATION FOR  
LEAVE TO APPEAL

ORAL ARGUMENT REQUESTED

Dated: August 11, 2020



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**STATEMENT OF BASIS FOR JURISDICTION**

This is an Application for Leave to Appeal a decision of the Michigan Court of Appeals (hereinafter "COA"). This Honorable Court has jurisdiction to hear the Appeal of Applicant-Appellant STEPHEN MICHAEL BIESZKA (hereinafter "BIESZKA") as this Honorable Court may review by appeal a decision of the COA that is clearly erroneous and will cause material injustice. MCR 28.723(B)(5)(a).

**ORDER APPEALED FROM, STATEMENT OF ERROR AND RELIEF SOUGHT**

The order appealed from is the written opinion issued on June 18, 2020, by the Michigan Court of Appeals (hereinafter "COA"). See Exhibit 1. The appeal the COA heard was on the written opinion issued on May 13, 2019, by the 48<sup>th</sup> Judicial Circuit Court on a re-hearing ordered by the Michigan Supreme Court on Appellant/Defendant's (Hereinafter "Bieszka") Petition to Determine Exemption from SORA and Petition for HYTA Treatment. See Exhibit 2.

The 48<sup>th</sup> Judicial Circuit Court (hereinafter "Trial Court") made a clear error in not properly applying the preponderance of evidence standard in its review of the evidence presented on the SORA exemption issue, now including a review of the text messages between Complainant and Bieszka, and ruled erroneously that Bieszka was not eligible for exemption from registration under MCL 28.722(2)(w)(iv).

Bieszka sought specifically to have the SORA Exemption ruling reversed and remanded to the trial court for a ruling consistent with the reasons stated in his appeal brief, specifically that the text messages show a consensual sexual relationship and that only after the Complainant's father found out about the relationship did Complainant change her story.

In the Application at bar, the COA's opinion, issued on June 18, 2020 is clearly erroneous and will cause material injustice if left to stand. MCR 7.305 (B)(5)(a). In its' opinion, the COA is attempting to create law. The COA state's that "in the context of participation in sexual activity, the term 'consent' has been defined to refer to '**affirmative consent**' meaning 'consent that is freely, willing, and clearly demonstrated in words and acts during a sexual encounter, usu just before intercourse' [citing Black's Law Dictionary 11<sup>th</sup>"]". See Exhibit 1, Page 5, Para 3.

Michigan DOES NOT HAVE an affirmative consent statute. This is commonly referred to as a "yes means yes" statute. Consent as defined by Merriam-Webster is "compliance in or approval of what is done or proposed by another". Under this generally accepted definition, then the text messages support the consensual nature of the relationship. Further, the testimony from the Preliminary Examination and original "Romeo and Juliet Hearing" in 16-19842-FC show that Complainant

changed positions on the issue of consent after Complainant's father discovered the relationship and based on these facts the COA's opinion from June 18, 2020 is not only clearly erroneous but also dangerous.

In this application for leave to appeal, BIESZKA respectfully requests that this Honorable Court vacate the Michigan Court of Appeals opinion issued on June 18, 2020 and issue an order that exempts BIESZKA from the registration requirements of Michigan's SORA statute pursuant to MCL 28.722(w)(iv), under MCL 28.723a, also known as a Romeo and Juliet Hearing.

#### STATEMENT OF QUESTIONS INVOLVED

I. Was the Michigan Court of Appeals written opinion issued on June 18, 2020, clearly erroneous and will cause material injustice if left to stand on the definition of consent in the case at bar?

Appellant will answer yes.

Appellee will answer no.

Trial court will answer no.

Org COA Docket 337977 declined to answer on original claim based on their decision of an untimely filing

MSC on original claim Vacated Trial Court and Remanded to the Trial Court to hear all evidence.

COA DOCKET NO. 349349 will answer no.

II. Did the Michigan Court of Appeals err in holding that the Trial Court did not err in its findings based on the evidence presented in a hearing held on February 16, 2017, now including a review of the text messages, for Defendant's Petition for Exemption from SORA?

Appellant will answer yes.

Appellee will answer no.

Trial court will answer no.

Org COA Docket 337977 declined to answer on original claim based on their decision of an untimely filing

MSC on original claim Vacated Trial Court and Remanded to the Trial Court to hear all evidence.

COA DOCKET NO. 349349 will answer no.

III. Did the Michigan Court of Appeals err in holding that the Trial Court did not err in finding Appellant did not meet the preponderance of evidence standard in rebutting the Complainant's statements presented in the preliminary examination and in hearing held on February 16, 2017, for Defendant's Petition for Exemption from SORA??

Appellant will answer yes.

Appellee will answer no.

Trial court will answer no.

Org COA Docket 337977 declined to answer on original claim based on their decision of an untimely filing

MSC on original claim Vacated Trial Court and Remanded to the Trial Court to hear all evidence.

COA DOCKET NO. 349349 will answer no.

## **STATEMENT OF PROCEDURAL AND MATERIAL FACTS**

### **Introduction**

This application for leave to appeal to the Michigan Supreme Court arises out of a written opinion issued by the Michigan Court of Appeals on June 18, 2020. This opinion affirmed the written opinion issued by the Trial Court on May 13, 2019, after, on order of the Michigan Supreme Court (See Exhibit 2), reviewing the hearing that was held on February 16, 2017, pursuant to MCL 28.723a, to determine if Bieszka is exempt from registration under Michigan Sexual Offender Registration Act (SORA) pursuant to MCL 28.722(w)(iv), under MCL 28.723a, also known as a Romeo and Juliet Hearing.

### **Procedural Facts**

On November 2, 2016, Bieszka pled guilty to assault with intent to commit sexual penetration under MCL 750.520(g)(1) in case no. 16-19842-FC. On February 16, 2017, the trial court

held a sentencing hearing which was adjourned and concluded on March 29, 2017. At the February 16, 2017, hearing the trial court heard Bieszka's motions for Holmes Youthful Trainee Act (HYTA) status and exemption from registration under SORA pursuant to MCL 28.722(w)(iv). At the conclusion of the February 16, 2017, hearing the trial court stated that it would take the motions under advisement and issue a ruling in the future.

On February 28, 2017, the trial court issued two conflicting orders. The first order stated that the ruling on Bieszka's HYTA and SORA motions would be given at sentencing hearing on March 29, 2017. This order has given rise to the other filings in this matter with COA and Michigan Supreme Court. On the issue for exemption from SORA, the trial court stated that Bieszka failed to rebut the victim's statements and testimony that clearly described non-consensual conduct and that Bieszka's conduct on the day in question strongly suggests a consciousness by Bieszka that his presence and sexual behavior was not voluntarily accepted by the victim. The Trial Court did not give any weight to the text message conversation between Complainant and Bieszka and between Complainant and Joseph Young.

On or about April 18, 2017, Bieszka filed a claim of appeal with the Court of Appeal seeking to reverse the 48th Circuit Court of Allegan County's ruling on Bieszka's Motion

for Exemption from SORA Registration. Bieszka had an appeal of right pursuant to MCL 28.723 (a)(6) regarding the trial court's ruling on his exemption from SORA motion.

On or about May 9, 2017, the Court of Appeals issued an order dismissing Bieszka claim of appeal for lack of jurisdiction. The Court of Appeals stated that pursuant to MCR 7.204(A)(2)(c) appeal of right in a criminal case must be taken within 42 days after entry of order appealed from. The Court of Appeals calculated the start date for the 42 day appeal period of March 6, 2017, the date of mailing for the order denying Bieszka from exemption of SORA registration as the order from the 48th Circuit Court was signed on February 28, 2017.

However, another order was also entered by the 48th Circuit Court on February 28, 2017, concerning Bieszka's Motion for Exemption from SORA stating that, "Opinion of the court regarding HYTA and SORA issues to be done at the same time as sentence". That order directly conflicted with the order denying Bieszka from exemption of SORA registration.

These two orders entered on February 28, 2017, contradict each other. Bieszka filed a Motion for Reconsideration which was denied and a Delayed Application for Leave to Appeal which was also denied.

Bieszka filed an Application for Leave to Appeal to the Michigan Supreme Court. On January 25, 2019, the Michigan

Supreme Court issued an Order to Vacate the Trial Court's ruling and Remanded this case back to the Trial Court to issue a written decision on the Romeo & Juliet Hearing and to consider the text messages.

On May 13, 2019, the Trial Court issued a written opinion, per order of the Michigan Supreme Court, denying Bieszka's Petition for Exemption from the Registration Requirements of the Michigan Sex Offender Registration Act.

Bieszka filed an Appeal to the Michigan Court of Appeals, as of right, based on the opinion issued by the Michigan Supreme Court on January 25, 2019. On June 18, 2020, the COA issued an opinion, See Exhibit 1, affirming the Trial Court's May 13, 2019 written opinion and defining "consent" in an inappropriate manner outside of its plain and ordinary meaning. Bieszka now comes before this Honorable Court through an Application for Leave to Appeal to the Michigan Supreme Court.

#### **Material Facts**

The preliminary examination in this matter was held on Wednesday, December 30, 2015. See Exhibit 3, Prelim Transcript (hereinafter "Prelim"). The complaining witness, minor S. G. (hereinafter "Complainant") was the only witness to give testimony. Complainant stated that she and Bieszka met on or about August 3, 2015, through Otsego Band Camp. Complainant stated that on August 7, 2015, she and Bieszka were

communicating via text messages but did not describe the content or nature of the conversation. See Prelim page 13, lines 20-24. Complainant stated that Bieszka came over to her house, one time, walked in uninvited, through the door closest to her room and forced himself upon her sometime around 4:00 p.m. on August 7, 2017. See Prelim page 18, lines 18-25.

Complainant went on to state that she told Bieszka that her father would be home around 5:00 p.m. Complainant testified that the entire event took about 30 minutes. Prelim page 12, lines 16-25. Complainant further stated that after the alleged incident she took a shower and that she got out of the shower after her father had returned home. Prelim page 26, lines 20-21. Complainant stated that she was not sure if she attended band camp practice on August 7, 2015. Prelim page 24, lines 12-14. Records show that Complainant and Bieszka were both present for the 5:00 p.m. band camp on August 7, 2015. See Exhibit 4. Complainant did not tell anyone about this alleged incident until October 15, 2015. Prelim page 25, lines 22-24. Complainant stated that she and Bieszka did not have a dating relationship. Prelim page 13, lines 16-19.

On February 16, 2017, a sentencing hearing was held in Case No. 16-19842-FH. See Sentencing Hearing Transcript dated February 16, 2017 (hereinafter "SORA Exemption"). See Exhibit 5. At this hearing, the trial court heard Bieszka's Petitions for Exemption from SORA and for HYTA status. Pursuant to MCL

28.723a(5)(a-d), during a Romeo and Juliet hearing, a victim of the offense has the following rights: to submit a written statement to the court; to attend the hearing and to make a written or oral statement to the court; to refuse to attend the hearing; and/or to attend the hearing but refuse to testify or make a statement at the hearing.

In this matter, Complainant chose to submit a written statement to the court which was read by the prosecuting attorney. SORA Exemption page 46, lines 16-25; page 27, lines 1-25; page 48, lines 1-25; page 49, lines 1-25; page 50, lines 1-25; and page 51, lines 1-2. In her written statement Complainant went into more details of the alleged incident but did not once mention any texting or communication between the parties prior to the alleged incident. SORA Exemption pages 46-51. Complainant restated that Bieszka only came over to her house one time on August 7, 2015. SORA Exemption page 47, lines 3-8.

Bieszka gave testimony at the SORA Exemption hearing. See SORA Exemption pages 8-29. Bieszka stated that he and Complainant met at band camp and that they had been texting since band camp and the conversation had risen to a romantic level with discussions about relationships. SORA Exemption page 8, lines 5-18. Bieszka stated that he had made multiple trips to Complainant's home on the day of August 12, 2015. SORA Exemption page 13, lines 14-15. Bieszka testified that he

and Complainant had conversation via text messaging and Facebook messenger on August 12, 2015, and that Complainant invited him over as their conversation had risen to the level of expression of romantic interest by both parties and a discussion regarding the topic of sex had started. SORA Exemption page 10, lines 1-13.

Bieszka stated that the first time he was at Complainant's house, on August 12, 2015, they kissed in the driveway around 2:00 or 3:00 p.m. SORA Exemption page 9, lines 5-16. Bieszka then returned to his house and began texting Complainant again. SORA Exemption page 9, lines 15-17. The conversation on the topic of sex continued. SORA Exemption page 12, lines 4-6. Bieszka then went to Complainant's house and they met in the driveway a second time. SORA Exemption page 10, lines 10-13. Bieszka, who had ridden his bicycle to Complainant's house on this second trip, then returned his bicycle to his house and Bieszka met Complainant again at her house and the two went inside at which point Complainant and Bieszka engaged in consensual sexual activity. SORA Exemption page 12, lines 2-9.

Along with Bieszka's testimony and Complainant's written letter, additional evidence was presented to the trial court in this Romeo and Juliet hearing. Robert Bieszka, father of Bieszka testified that on October 15, 2015, he was informed by mother of Complainant that she just learned that Complainant

and Bieszka had sex. SORA Exemption page 33, lines 4-25. Robert Bieszka went on to offered testimony as to his perception that father of Complainant is known to have a temper and that he had a conversation with Complainant's mother wherein she stated she did not know if she could tell Complainant's father about finding out Appellant and Complainant had sex. SORA Exemption page 35, lines 7-18.

Counsel of Bieszka also presented to the trial court evidence, via text messages which were extracted by Adam Kelly of Data Exam, L.L.C., that a consensual relationship did exist and lasted well beyond the date of the alleged incident. See Exhibit 6. Text messages between Bieszka and Complainant show a conversation, on or about September 3, 2015, that although Bieszka was still in love with Complainant, she did not want a romantic relationship anymore. See Exhibit 6, messages 3-8, page 1. The fact that this relationship did exist was confirmed by text messages between Complainant and an individual named Joseph Young. Complainant told Joseph Young that Appellant got needy so she ended the relationship. See Exhibit 7, messages 1-3, page 2.

In the three page opinion, the Honorable Robert A. Kengis stated that the Trial Court followed the instruction of the MSC and reviewed the transcript and video recording from the hearing held on February 16, 2017 and reviewed the briefs filed by both parties with regard to this issue. The Trial

Court reviewed all exhibits including; the Complainant's written statement read on the record, the text messages between Complainant and Defendant and between Complainant and Joseph Young. The Trial Court also reviewed the transcript and video recording of the Preliminary Examination held on December 30, 2016.

In its opinion, the Trial Court found that although the text message, at most, establish that at some point there was a romantic relationship between Appellant and Complainant, there was not enough to determine consent between the parties for the incident that Appellant pled. The Trial Court also stated that it found that Defendant's incentive to lie outweighs Complainant's incentive.

#### LEGAL ARGUMENTS

ARGUMENT I - Was the Michigan Court of Appeals written opinion issued on June 18, 2020, clearly erroneous and will cause material injustice if left to stand on the definition of consent in the case at bar?

#### STANDARD OF REVIEW

The interpretation of a statute or court rule involves a question of law then it is reviewed de novo. *People v Parker*, 319 Mich App 664, 669; 903 NW2d 405 (2017). The Court gives undefined terms their plain and ordinary meanings and will often consult dictionary definitions in conferring such meaning. *People v Duncan*, 494 Mich 713, 723; 835 NW2d 399

(2013). If the plain and ordinary meaning of a statute or court rule is clear, judicial construction is not necessary. *People v Morey*, 461 Mich 325, 330; 603 NW2d 250 (1999); *People v Howell*, 300 Mich App 638, 645; 834 NW2d 923 (2013).

A lower court's findings of fact with regard to a defendant's petition for removal from the sex offender registry are reviewed for clear error. *People v Hesch*, 278 Mich App 188, 192; 749 NW2d 267 (2008). A decision is clearly erroneous if the appellate court is left with a definite and firm conviction that a mistake has been made. *People v Williams*, 268 Mich App 416; 707 NW2d 624 (2005).

#### **PRESERVATION OF ERROR**

The Michigan Supreme Court has discretionary review and may review by appeal a case after decision by the COA that is clearly erroneous and will cause material injustice. Application is considered timely if filed within 56 days in criminal cases the COA's final order. MCR 7.303; MCR 7.305(C)(2)(a).

#### **PRINCIPAL POINT OF ARGUMENT**

The crux of this matter going back to the "Romeo and Juliet" Hearing has been consent. In its' opinion, the COA is attempting to create "yes means yes" law in Michigan. The COA state's that "in the context of participation in sexual activity, the term 'consent' has been defined to refer to 'affirmative consent' meaning 'consent that is freely,

willing, and clearly demonstrated in words and acts during a sexual encounter, usu [sic] just before intercourse' [citing Black's Law Dictionary 11th]". See Exhibit 1, Page 5, Para 3. Michigan does not have an Affirmative Consent Statute.

Consent is not defined under Michigan SORA. Consent as defined by Merriam-Webster is "compliance in or approval of what is done or proposed by another". Under this generally accepted and generally understood definition, the text messages between Bieszka and Complainant clearly shows a consensual romantic high school relationship existed. By these terms it is for the most part universally understood that with the majority of these romantic high school relationships there is some kind of sexual type component.

The text messages in this matter support this understanding. In its' opinion the COA is attempting to say that Bieszka would need a documented affirmative consent for every sexual type interaction with his then girlfriend to meet the preponderance of evidence standard. The COA is not interpreting the law, it is creating it.

As stated above, Michigan does not have an affirmative consent statute, nor do we need the COA to create one for us. In order for Bieszka to meet the preponderance of evidence standard, he does not need to produce evidence that shows Complainant affirmatively consented specifically to their physical activity on each specific date any physical activity

occurred. The text messages along with the testimony of Bieszka and the supporting testimony of Robert Bieszka is more than enough to clear the preponderance of evidence standard that a consensual, romantic relationship did exist on or about August 7, 2015.

As to Argument I, a petition must be granted if the court determines that the conviction for the listed offense was the result of a consensual sexual act between the petitioner and the victim, the victim was 13 years old or older but less than 16 years old at the time of the offense, and the petitioner is not more than 4 years older than the victim. MCL 28.728c(14)(a). Pursuant to MCL 28.722(w)(iv), Bieszka should be exempt from Michigan's SORA registration. One of the tests under this is consent. The Trial Court in its' written opinion of May 13, 2019 and the Michigan Court of Appeals opinion on June 18, 2020, in affirming the Trial Court's Order as to defining consent are clearly erroneous. There can be no other finding then a definite and firm conviction that a mistake has been made and if left to stand amounts to manifest injustice.

**ARGUMENT II - Did the Michigan Court of Appeals err in holding that the Trial Court did not err in its findings based on the evidence presented in a hearing held on February 16, 2017, now including a review of the text messages, for Defendant's Petition for Exemption from SORA?**

### STANDARD OF REVIEW

A lower court's findings of fact with regard to a defendant's petition for removal from the sex offender registry are reviewed for clear error. *People v Hesch*, 278 Mich App 188, 192; 749 NW2d 267 (2008). A decision is clearly erroneous if the appellate court is left with a definite and firm conviction that a mistake has been made. *People v Williams*, 268 Mich App 416; 707 NW2d 624 (2005).

### PRESERVATION OF ERROR

The Michigan Supreme Court has discretionary review and may review by appeal a case after decision by the COA that is clearly erroneous and will cause material injustice. Application is considered timely if filed within 56 days in criminal cases the COA's final order. MCR 7.303; MCR 7.305(C)(2)(a).

### PRINCIPAL POINT OF ARGUMENT

In its written opinion of June 18, 2020 the COA stated that the text messages do not reference consent with respect to the incident that led to Bieszka's conviction. See Exhibit 1.

At issue in this case is whether there was a consensual sexual act between Bieszka and Complainant. Consent impliedly comprehends that a willing, noncoerced act of sexual intimacy or intercourse between the parties involved. *People v Bayer*,

279 Mich App 49, 67; 756 NW2d 242 (2008), judgment vacated in part on other grounds 482 Mich 1000 (2008), quoting *People v Khan*, 80 Mich App 605, 619 n 5; 264 NW2d 360 (1978).

Pursuant to MCL 28.723a(2), Bieszka had the burden of proof by a preponderance of the evidence standard that Complainant consented to the sexual act in question or at issue with a pleading of guilty. Preponderance of the evidence means such evidence as, when weighed with that opposed to it, has more convincing force and the greater probability of truth. *People v Cross*, 281 Mich App 737, 740; 760 NW2d 314 (2008).

The original trial court was fixated on the fact Bieszka, prior to Bieszka and Complainant engaging in sexual activity, took his bicycle home. This Trial Court in its written opinion hangs it's hat on who has the most incentive to lie. Both of these analyses are wrong. Under normal circumstances, this Honorable Court will not interfere with the trier of fact's role of determining the weight of the evidence of credibility of witnesses. *Williams* supra at 419. However, in this matter the finding is not only erroneous and clearly against the great weight of the evidence but completely inappropriate in view of the text messages. See Exhibit 6 & 7. These are high school students who were engaged in a consensual romantic relationship and even in its May 13, 2019, written opinion, the Trial Court found that the text messages do establish that

at some point during this period there was a romantic relationship between Bieszka and Complainant.

Complainant's testimony in the Preliminary Examination states that there was no relationship, that the alleged incident was a onetime event. See Exhibit 3. Complainant's written statement read at the SORA hearing, See Exhibit 5, reiterates her testimony given at the preliminary examination. Complainant never addresses the fact that Complainant and Joseph Young had a conversation about each of them losing their virginity in 2015, and where Complainant never made any statements to Joseph Young that the alleged incident was nonconsensual. See Exhibit 7, messages 1-14, page 1. Complainant also gave no reason for waiting until October of 2015 to file charges. Again, this alleged incident was only reported after Complainant's parent found out about the relationship. See Exhibits 3, 5, 6 and 7. A review of the testimony and written statement given by Complainant shows inconsistencies, gaps and fallacies when compared to the text messages.

Bieszka's testimony given at the SORA Exemption hearing clearly rebuts Complainant's testimony at the Preliminary Exam and the written statement read at the SORA hearing. With the support of the text message evidence, Bieszka's testimony in this matter shows a complete picture of the events that transpired in August, 2015, where Complainant's testimony does

not. Exhibits 6 and 7 shows that there was a consensual relationship between Bieszka and Complainant that began in early August of 2015 and last into September of 2015. The testimony of Robert Bieszka, as to the temperament of Complainant's father, gives rise to the only reason that allegations were ever made to authorities. See Exhibit 5, page 35, lines 7-18.

In this matter Bieszka's testimony and evidence, specifically the text messages, present clearly, when weighed against the testimony of Complainant in the Preliminary Examination and Complainant's written statement, that it has more convincing force and the greater probability of truth. *Cross supra* at 740. Complainant and Bieszka were in a consensual romantic relationship and the COA (Exhibit 1) and the Trial Court (Exhibit 2) found the existence of the relationship. These two high school students engaged in consensual sexual relations. This is supported by the text messages. See Exhibits 6 & 7. The status of the relationship only changed once Complainant's father was made aware of the sexual relationship. The COA in affirming the Trial Court ruling, in its written opinion on May 13, 2019, in finding that Complainant did not consent to the conduct constituting the violation, pursuant to MCL 28.722(w)(iv), is clearly and unequivocally erroneous.

As to Argument II, Bieszka clearly and unequivocally shows that he presented evidence at the SORA exemption hearing and with the text messages being fully considered that when weighed with that opposed to it, has more convincing force and the greater probability of truth that the sexual relationship between Complainant and Bieszka was indeed consensual.

Pursuant to MCL 28.722(w)(iv), Bieszka should be exempt from Michigan's SORA registration. There was a clear error by the trial court in applying the preponderance of evidence standard in written opinion of May 13, 2019 and clear err by the Michigan Court of Appeals in affirming the Trial Court's Order. There can be no other finding then a definite and firm conviction that a mistake has been made and if left to stand amounts to manifest injustice.

**ARGUMENT III - Did the Michigan Court of Appeals err in holding that the Trial Court did not err in finding Appellant did not meet the preponderance of evidence standard in rebutting the Complainant's statements presented in the preliminary examination and in hearing held on February 16, 2017, for Defendant's Petition for Exemption from SORA?**

#### **STANDARD OF REVIEW**

A lower court's findings of fact with regard to a defendant's petition for removal from the sex offender registry are reviewed for clear error. *People v Hesch*, 278 Mich App 188, 192; 749 NW2d 267 (2008). A decision is clearly

erroneous if the appellate court is left with a definite and firm conviction that a mistake has been made. *People v Williams*, 268 Mich App 416; 707 NW2d 624 (2005).

#### PRESERVATION OF ERROR

The Michigan Supreme Court has discretionary review and may review by appeal a case after decision by the COA that is clearly erroneous and will cause material injustice. Application is considered timely if filed within 56 days in criminal cases the COA's final order. MCR 7.303; MCR 7.305(C)(2)(a).

#### PRINCIPAL POINT OF ARGUMENT

Page 2, Paragraph 3 of Exhibit 2, trial court's opinion regarding Bieszka's Exemption from SORA, states that Complainant and Appellant gave opposite testimony on the issue of consent at the Preliminary Examination held on February 16, 2017. In review of the testimony, the Trial Court stated that it used the factors listed in MI CRIM JI 3.6, witness credibility. MI CRIM JI 3.6 states,

(1) As I said before, it is your job to decide what the facts of this case are. You must decide which witnesses you believe and how important you think their testimony is. You do not have to accept or reject everything a witness said. You are free to believe all, none, or part of any person's testimony.

(2) In deciding which testimony you believe, you should rely on your own common sense and everyday experience. However, in deciding whether you believe a witness's testimony,

you must set aside any bias or prejudice you may have based on the race, gender, or national origin of the witness.

(3) There is no fixed set of rules for judging whether you believe a witness, but it may help you to think about these questions:

(a) Was the witness able to see or hear clearly? How long was the witness watching or listening? Was anything else going on that might have distracted the witness?

(b) Did the witness seem to have a good memory?

(c) How did the witness look and act while testifying? Did the witness seem to be making an honest effort to tell the truth, or did the witness seem to evade the questions or argue with the lawyers?

(d) Does the witness's age and maturity affect how you judge his or her testimony?

(e) Does the witness have any bias, prejudice, or personal interest in how this case is decided?

(f) Have there been any promises, threats, suggestions, or other influences that affected how the witness testified?

(g) In general, does the witness have any special reason to tell the truth, or any special reason to lie?

(h) All in all, how reasonable does the witness's testimony seem when you think about all the other evidence in the case?

(4) Sometimes the testimony of different witnesses will not agree, and you must decide which testimony you accept. You should think about whether the disagreement involves something important or not, and whether you think someone is lying or is simply mistaken. People see and hear things differently, and witnesses may testify honestly but simply be

wrong about what they thought they saw or remembered. It is also a good idea to think about which testimony agrees best with the other evidence in the case.

(5) However, you may conclude that a witness deliberately lied about something that is important to how you decide the case. If so, you may choose not to accept anything that witness said. On the other hand, if you think the witness lied about some things but told the truth about others, you may simply accept the part you think is true and ignore the rest

The Trial Court stated that it found Complainant's testimony more credible than Bieszka's testimony and that Bieszka failed to prove by a preponderance of the evidence that his conduct fell within the exceptions for SORA registration; therefore, he is required to register. The Trial Court, in its written opinion, hangs it's hat on who has the most incentive to lie. See Exhibit 1, Page 3, Para 1. The MI Crim JI 3.6(3)(g) states, "In general, does the witness have any special reason to tell the truth, or any special reason to lie?"

Under normal circumstances, the Michigan Court of Appeals will not interfere with the trier of fact's role of determining the weight of the evidence of credibility of witnesses. *Williams* supra at 419. However, in this matter the finding is not only erroneous and clearly against the great weight of the evidence but completely inappropriate in view of the text messages. See Exhibit 6 & 7. The text messages show

that this was a consensual romantic relationship and that the status of the relationship changed only after Complainant's father found out about the relationship. See Exhibit 5 - SORA Exemption page 33-35. However, the COA failed to properly weigh the evidence as well.

Bieszka argued to the COA that the trial court did not properly apply the preponderance of evidence standard in that Bieszka's evidence presented in the SORA hearing did in fact rebut Complainant's testimony. Preponderance of the evidence means such evidence as, when weighed with that opposed to it, has more convincing force and the greater probability of truth. *Cross supra* at 740.

MCL 28.723a states,

(1) If an individual pleads guilty to or is found guilty of a listed offense or is adjudicated as a juvenile as being responsible for a listed offense but alleges that he or she is not required to register under this act because section applies 2(w)(iv) applies, and the prosecuting attorney disputes that allegation, the court shall conduct a hearing on the matter before sentencing or disposition to determine whether the individual is required to register under this act.

(2) The individual has the burden of proving by a preponderance of the evidence in a hearing under this section that his or her conduct falls within the exceptions described in subsection (1) and that he or she is therefore not required to register under this act.

Complainant's testimony in the Preliminary Examination states that there was no relationship and that the alleged incident was a onetime event. See Exhibit 3. The text messages between the Complainant and Bieszka and between Complainant and Joseph Young clearly and unequivocally rebut Complainant's Preliminary Examination testimony. Complainant's written statement read at the SORA hearing makes no mention of the communication between the parties after the alleged incident nor does it address the fact that Complainant told Joseph Young that she broke up with Bieszka. See Exhibits 6 & 7. The text messages between the Complainant and Bieszka and between Complainant and Joseph Young fills in the gaps of the Complainant's written statement and shows us a complete and true picture of the actual, consensual relationship between Complainant and Bieszka. See Exhibit 6. Complainant also gave no reason for waiting until October of 2015 to file charges other than her parents finding out about the relationship. See Exhibits 3 & 5. Allegations were made and charges were pursued only after Complainant's parent found out about the relationship. See Exhibit 5 - SORA Exemption page 33-35.

Bieszka's testimony given at the SORA Exemption hearing, along with the text messages clearly rebuts Complainant's testimony at the Preliminary Exam and the written statement read at the SORA hearing. Bieszka's testimony in this matter shows a complete picture of the events that transpired in

August, 2015, where Complainant's testimony does not. Exhibits 6 & 7 shows, through the text messages, that there was a consensual relationship between Bieszka and Complainant that began in early August of 2015 and last into September of 2015. Even in its May 13, 2019, written opinion, the Trial Court found that the text messages do establish that at some point during this period there was a romantic relationship between Bieszka and Complainant. See Exhibit 1, Page 3, Para 2. A finding that any sexual relationship was anything other than consensual is erroneous.

In this matter Bieszka's testimony and evidence, including the text messages, presented clearly, when weighed against the testimony of Complainant in the Preliminary Examination and Complainant's written statement, has more convincing force and the greater probability of truth. Cross supra at 740. The COA has erred in affirming the lower court's finding that Bieszka did not rebut Complainant's statements presented in the preliminary examination and in hearing held on February 16, 2017, for Bieszka's Petition for Exemption from SORA.

As to Argument III, Bieszka clearly and unequivocally shows that he did in fact rebut Complainant's testimony in the Preliminary Examination and the written statement, which was read by the prosecuting attorney at the SORA exemption hearing by a preponderance of the evidence. A review of the testimony

and written statement given by Complainant shows inconsistencies, gaps and fallacies. Testimony given by Bieszka shows a complete and total picture of the actual circumstances of this matter. Complainant and Bieszka were in a consensual romantic relationship and the Trial Court found the existence of the relationship. See Exhibit 1. These two high school students engaged in sex. This is supported by the text messages. The status of the relationship only changed once Complainant's father was made aware of the sexual relationship.

Pursuant to MCL 28.722(w)(iv), Bieszka should be exempt from Michigan's SORA registration. There was a clear error by the trial court in applying the preponderance of evidence standard in written opinion of May 13, 2019 and clear err by the Michigan Court of Appeals in affirming the Trial Court's Order. There can be no other finding then a definite and firm conviction that a mistake has been made and if left to stand amounts to manifest injustice.

#### CONCLUSION

Bieszka undeniably shows that he presented evidence at the SORA exemption hearing and with the text messages being fully considered that when weighed with that opposed to it, the inconsistencies, gaps and fallacies of the testimony and written statement given by Complainant, has more convincing force and the greater probability of truth that the sexual

relationship between Complainant and Bieszka was indeed consensual and that the only reason this matter is before this Honorable Court is because of Complainant's father known temper has coerced Complainant into a different reality. This is clearly shown by the evidence presented. The Trial Court's determination that Bieszka's incentive to lie outweighs Complainant's incentive to lie is erroneous and if left to stand amount to manifest injustice. The Michigan Court of Appeal's holding that consent is affirmative and Bieszka would need a text showing "yes means yes" on the specific day is egregiously erroneous and if left to stand amount to manifest injustice, as well. The evidence, as discussed above, shows Complainant's story changed after her father was made aware of the relationship. Bieszka's story did not change and is supported by additional evidence. See Exhibit 3, 5, 6 & 7. There can be no other finding then a definite and firm conviction that a mistake has been made and if left to stand amounts to manifest injustice. This must be reversed and remanded to the trial court for an order consistent with the above analysis.

**RELIEF REQUESTED**

**WHEREFORE,** the Applicant-Appellant, Stephen Michael Bieszka, respectfully requests that this Honorable Court to enter the following ruling:

- a) Vacate the written opinion issued on June 18, 2020, by the Michigan Court of Appeal in Michigan COA Docket No. 34349; and
- b) Issue an Order that exempts Applicant-Appellant Stephen Michael Bieszka from the registration requirements of Michigan's SORA statute pursuant to MCL 28.722(w)(iv), under MCL 28.723a, also known as a Romeo and Juliet Hearing.

Respectfully Submitted,

Dated: August 11, 2020



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